**Editor's note: Reconsideration granted; decision vacated in part -- See 103 IBLA 138 (July 20, 1988)**

MARATHON OIL CO.

IBLA 85-794 Decided September 30, 1986

Appeal from a decision of the Associate Director for Royalty Management, Minerals Management Service, to distribute disputed royalties.

Affirmed in part; reversed in part and remanded.

1. Accounts: Generally--Accounts: Distribution of Receipts --Administrative Procedure: Generally--Mineral Leasing Act: Royalties--Rules of Practice: Appeals: Generally

The Mineral Leasing Act, as amended, 30 U.S.C. § 191 (Supp. III 1985), and 30 CFR 219.100 provide for placement of those royalty payments payable to a state which are under challenge in a suspense account pending resolution of the dispute. Where the district court orders an oil and gas lessee to make additional royalty payments and the lessee complies but appeals from the district court decision, a decision by the Minerals Management Service to distribute the additional and disputed funds to the State of Alaska will be reversed on appeal to the Board of Land Appeals in accordance with 30 U.S.C. § 191 (Supp. III 1985) and 30 CFR 219.100.

APPEARANCES: Patricia L. Brown, Esq., Washington, D.C., for appellant; Peter J. Schaumberg, Esq., Geoffrey Heath, Esq., Bruce W. Dannemeyer, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Marathon Oil Company (Marathon) appeals from a decision of the Associate Director for Royalty Management, Minerals Management Service (MMS), to distribute disputed royalties, paid to MMS pursuant to the Federal District Court of Alaska's order in Marathon Oil Co. v. United States, 604 F. Supp. 1375 (D. Alaska 1985), to the State of Alaska and Cook Inlet Region, Inc. (CIRI).

In the above-cited litigation Marathon sought declaratory relief to resolve a controversy between it and the United States, the State of Alaska,

and CIRI involving the proper method of determining the well-head value of natural gas for royalty purposes. On the United States motion for summary judgment and its prayer for an accounting to determine royalties due from Marathon, and on Marathon's motion for a preliminary injunction and judicial stay of administrative action, the district court held that MMS orders directing Marathon to use the net-back method for computing gas royalties were within the agency's authority under the applicable statutes and regulations. The court granted the United States motion for summary judgment and the prayer for accounting to determine royalties, and denied Marathon's motion for a preliminary injunction and judicial stay of administrative action. Marathon appealed the district court's decision to the Ninth Circuit Court of Appeals. The lower court was affirmed by the Ninth Circuit on July 24, 1986 (Marathon Oil Co. v. United States, No. 85-3800), but the time for appeal to the U.S. Supreme Court has not yet expired, and certain issues remain before the district court.

Meanwhile, pursuant to the district court's order of May 1, 1985, Marathon made an accounting and paid the royalties and interest due as required by the terms of the MMS orders which were the subject of the litigation. In its cover letter to the accounting and payment, dated June 3, 1985, Marathon stated:

> Marathon hereby formally requests that the portion of the additional royalty payments represented by the enclosed check [in the amount of $9,111,527.42] due under the Order to CIRI as well as to the State of Alaska's share of the federal royalty (including interest paid thereon) be placed in an interest-bearing suspense account by the MMS pending final judicial resolution of this dispute.
>
> Due to circumstances well known to the MMS, any distribution of additional royalty payments to CIRI before final judicial resolution of this dispute may seriously jeopardize Marathon's ability to recover royalty overpayments and interest both from CIRI and from the numerous other native corporations to which CIRI is required to distribute substantial portions of such funds.

Marathon followed up its formal request by several telephone calls to MMS and was informed in the course of a call on June 24, 1985, that MMS had made the decision to distribute the funds by the end of the day.

In its statement of reasons, Marathon explains that the majority of the funds in dispute, totaling more than $9,000,000, are to be distributed to CIRI which is the majority royalty holder and to the State of Alaska, which receives 90 percent of the Federal share of oil and gas royalties under the Mineral Leasing Act, as amended, 30 U.S.C. § 191 (Supp. III 1985). Appellant refers to section 104 of the Federal Oil and Gas Royalty Management Act, P.L. 97-451, 96 Stat. 2451-52, amending 30 U.S.C. § 191 (Supp. III 1985), and argues that in the case of a dispute, Federal royalties payable to a state must be escrowed in an interest-bearing account until

resolution of the dispute. Marathon also notes that, under the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1606(i) (1982), CIRI is required to distribute 70 percent of the funds it receives as royalties to 12 Alaska Native corporations formed under ANCSA.

Marathon reasons that if the funds are retained by the United States in an interest-bearing account, the interests of all parties to the litigation and the interests of the Native corporations not before the court will be protected. Further, Marathon notes, there will be compliance with the law which expressly requires escrow of the State's portion of the disputed royalties. 30 U.S.C. § 191 (Supp. III 1985). Marathon contends that if MMS disburses the funds, it will be a difficult and protracted process for it to recoup the funds, should it, in part, prevail in the pending litigation.

Marathon requests that this Board require MMS to retain the disputed funds in an interest-bearing suspense account until resolution of the royalty dispute. 1/

On September 6, 1985, MMS filed a motion to dismiss this appeal pursuant to 43 CFR Part 4 and 30 CFR 290.2 and 290.7 contending the Board lacks jurisdiction in this matter. 2/ MMS asserts the decision in issue was made by the MMS Associate Director for Royalty Management, rather than the Director, as required by the regulations, and is not appealable to the Board. MMS' motion is based on the affidavit of Robert Boldt, former Associate Director of MMS, in which he stated he, and not the Director of MMS, made the decision to distribute the royalty funds.

Marathon filed an opposition to MMS' motion to dismiss, asserting the decision of Boldt was final because the Director was aware of and acquiesced in the initial and subsequent decisions of his immediate subordinate to distribute the disputed funds.

We will first consider MMS' motion to dismiss. The applicable 30 CFR regulations read as follows:

> § 290.2 Who may appeal.
>
> Any party to a case adversely affected by a final order or decision of an officer of the Minerals Management Service shall have a right to appeal to the Director, Minerals Management Service, unless the decision was approved by the Secretary or the Director prior to promulgation.

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1/ Marathon has amended its notice of appeal 16 times to cover disputed royalty payments made on subsequent dates. The last amended notice, filed on Sept. 24, 1986, states the disputed payments "now total nearly $14,800,000."

2/ On Sept. 13, and Dec. 30, 1985, MMS filed supplements to its motion to dismiss. In the latter supplement, MMS extended its motion to cover Marathon's amended notices of appeal and to cover appeals which Marathon may file in the future. Marathon responded by stating that the facts will not support a motion to dismiss.

§ 290.7 Appeals to the Board of Land Appeals.

> Any party to a case adversely affected by a final decision of the Director, Minerals Management Service, or the Commissioner of Indian Affairs under this part shall have a right of appeal to the Board of Land Appeals in the Office of Hearings and Appeals, Office of the Secretary, in accordance with the procedures provided in 43 CFR Part 4, "Department Hearings and Appeals Procedures."

MMS contends the decision to distribute funds was not made by the Director and was therefore not a final decision within the meaning of 30 CFR 290.7. The facts show the Director was aware of Boldt's decision to distribute the funds. On June 3, 1985, Marathon hand delivered a check for the court-ordered payment to Boldt's office which was accompanied by a formal request that the disputed portion of the payment be placed in escrow. A copy of that document was delivered to William D. Bettenberg, Director, MMS. There is no evidence Marathon received a response to this request, but it was informed orally on June 24, 1985, that the funds would be distributed that day. The Director was on notice of Marathon's request at the time distribution was made, and was in a position to prevent the distribution, if he had chosen to do so. In addition, Marathon's notice of appeal to this Board was filed with the Director and all subsequent amended notices of appeal were served on him. Thus it seems clear the Director did approve Boldt's decision to distribute the funds. This being the case, there was no need for Marathon to appeal to the Director from Boldt's decision. See 30 CFR 290.2.

We also note Boldt's name was mentioned by the court in Marathon Oil Co. v. United States, supra, in connection with the royalty orders at issue in that litigation. There is no question the court determined these orders to be final. See Marathon Oil Co. v. United States, supra at 1377 n.8 and 1388.

30 CFR 290 requires that a decision must be final in order to be appealed. It is clear Boldt treated his decision to distribute the funds as final for MMS, because the funds were, in fact, distributed. If either Boldt or Bettenberg did not consider his decision to be final, MMS should not have distributed the funds. The action of MMS subsequent to appeal by Marathon clearly demonstrates MMS considered the decision to be final.

In light of the evidence and action by MMS, we find Boldt's decision to distribute the funds was a final decision for MMS approved by the Director. Therefore, we find no useful purpose which would be served by now remanding the case to the Director. See California Association of Four Wheel Drive Clubs, 30 IBLA 383, 387 (1977). We deny MMS' motion to dismiss Marathon's appeal.

We turn now to consideration of whether the funds paid by Marathon under court order should be placed in a suspense account pending a final determination in the Marathon litigation.

30 U.S.C. § 191 (Supp. III 1985) which provides for the distribution of moneys received from royalties reads in pertinent part as follows:

> All money received from sales, bonuses, royalties including interest charges collected under the Federal Oil and Gas Royalty Management Act of 1982 [30 U.S.C.A § 1701 et seq.], and rentals of the public lands under the provisions of this chapter and the Geothermal Steam Act of 1970 [30 U.S.C.A. § 1001 et seq.], notwithstanding the provisions of section 20 thereof [30 U.S.C.A. § 1019], shall be paid into the Treasury of the United States; 50 per centum thereof shall be paid by the Secretary of the Treasury to the State other than Alaska within the boundaries of which the leased lands or deposits are or were located; * * * and of those from Alaska, 90 per centum thereof shall be paid to the State of Alaska for disposition by the legislature thereof: * * * Payments to States under this section with respect to any moneys received by the United States, shall be made not later than the last business day of the month in which such moneys are warranted by the United States Treasury to the Secretary as having been received, except for any portion of such moneys which is under challenge and placed in a suspense account pending resolution of a dispute. Such warrants shall be issued by the United States Treasury not later than 10 days after receipt of such moneys by the Treasury. Moneys placed in a suspense account which are determined to be payable to a State shall be made not later than the last business day of the month in which such dispute is resolved. Any such amount placed in a suspense account pending resolution shall bear interest until the dispute is resolved. [Emphasis added.]

Under 30 U.S.C. § 191 (Supp. III 1985), Alaska is entitled to 90 percent of all royalties received by the United States from oil and gas production on Federal lands in the Kenai field. A portion of the funds to which Alaska is entitled in this case is the subject of pending litigation. Therefore, we find these funds to be "under challenge" within the meaning of 30 U.S.C. § 191 (1982). In addition, 30 CFR 219.100 provides that the mineral lease revenues shall be distributed to the State, "except for any portion of such revenues which is under challenge and placed in a suspense account pending resolution of the dispute." When funds have been determined to be under challenge, both 30 U.S.C. § 191 (Supp. III 1985) and 30 CFR 219.100 provide for placement of the disputed amount in a suspense account.

Court recognition of a suspense account is found in Watt v. Alaska, 451 U.S. 259 (1981). That case involved a dispute between the United States, Alaska, and the Kenai Peninsula Borough as to whether revenues from leases should be distributed according to a formula provided in section 35 of the Mineral Leasing Act, as amended, 30 U.S.C. § 191 (1976) or one provided in section 401(c) of the Wildlife Refuge Revenue Sharing Act, as amended,

16 U.S.C. § 715s(c) (1976). 3/ The court explained that since the commencement of this litigation in 1976, 90 percent of oil and gas revenues from the Kenai Range had been paid into an escrow account. Watt v. Alaska, supra at 263 n.6. The Marathon litigation involves a dispute regarding the amount due as royalties under the Mineral Leasing Act, and there can be no argument that the additional amounts paid are under challenge. In spite of the fact that 30 U.S.C. § 191 (Supp. III 1985) and 30 CFR 219.100 provide for placement of disputed amounts in a suspense account pending resolution of the dispute, MMS has offered no explanation for its failure to do so, and the record discloses no justification for its inaction. Therefore, we hereby direct MMS to establish the suspense account noted in 30 U.S.C. § 191 (Supp. III 1985) and 30 CFR 219.100 and take such action as is necessary to place that amount remaining under challenge in said suspense account.

There is no comparable statutory provision for escrow of the funds earmarked for distribution to CIRI. Therefore, no escrow of disputed amounts which ultimately would be distributed to CIRI is required by law. MMS' decision to distribute those funds is affirmed.

We are aware of the costs involved in establishing the escrow account called for in 30 U.S.C. § 191 (Supp. III 1985). However, we must also recognize that, when Congress provided for the establishment of a suspense account, it provided a means to avoid the loss of interest Marathon might incur if it prevails in whole or in part on appeal. The threat of loss of interest has been held to be a threat of irreparable harm in cases involving a stay of MMS' decision regarding payment of additional royalty payments pending appeal. See Marathon Oil Co., 90 IBLA 236, 245-47, 93 I.D. 6, 12 (1986), citing Placid Oil Co. v. United States Department of the Interior, 491 F. Supp. 895 (N.D. Texas 1980) and Conoco, Inc. v. Watt, 559 F. Supp. 627 (E.D. La. 1982).

Therefore, the decision of MMS is affirmed as to the funds to be distributed to CIRI and reversed and remanded as to the funds to be distributed to the State of Alaska.

R. W. Mullen
Administrative Judge

We concur:

John H. Kelly
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

3/ We note this decision was issued prior to the date section 191 of the Mineral Leasing Act was amended by section 104 of the Federal Oil and Gas Royalty Management Act of 1982, P.L. 97-451, 96 Stat. 2451.